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United States Circuit Court of Appeals

For the Ninth Circuit

IN ADMIRALTY

FREDERICK H. GREIME,
Libelant and Appellant,

vs.

Steam Vessel "DAISY", etc.,
S. S. "FREEMAN",
Claimant and Appellee.

APPELLANT'S REVIEW OF APPELLEE'S BRIEF.

H. W. HUTTON,
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APPELLANT'S REVIEW OF APPELLEE'S BRIEF.

On page 4 of appellee's brief we find:

> "In appellant's description is a constant recurrence of the statement that the falls were too short."

Either side of the "Daisy" was liable to be at the dock at any time. Which ever side was at the dock, the fall on the offshore side would be too short by the distance between the outer ends of the booms, to-wit: 50 feet, so both falls were too short.

And by the testimony of their own witness, Evanson, "the falls on the Daisy were shorter than ordinary falls".

There could not be 125 feet of wire cable hanging down from the head of the boom at any time, as mentioned on page 6 of appellee's brief. The so-called evidence of Mr. Freeman is to the effect that the falls were 180 feet long, the boom 56, which would leave 124 feet, from which would have to be deducted the distance from the quarter block at the foot of the boom to the winch and the necessary turns around the drum. It was not shown how much of the fall it would require to meet those requirements.

We submit that the criticism on page 6 of said brief on what we claim the answer admits, as to how the steam winch was designed to be constructed and operated, is a struggle with words, while disregarding substance, as, an admission that the winch was designed to and constructed to be operated *substantially* as mentioned in the complaint, is an admission that it was designed and constructed to be operated that way.

None of the authorities on page 8 of appellee's brief are pertinent to this case. All say that common prudence is the test of the soundness of a custom. An absence of common prudence is shown in this case. The furnishing of falls, that all the evidence shows were inadequate by reason of shortness, that led to a disconnecting of them, when they should have been together, the fact that the evidence shows

they were continually being pulled out of the holder's hands, which meant that at some time or other someone was bound to get hurt, shows lack of common prudence.

On page 9 of said brief we find:

> "Without conflict, the evidence is that ship's falls are usually about three times the length of the boom (Ap. 47, 51). And this is not an arbitrary length fixed without reason, as appellant would have the court believe. Experience has proved that that amount of cable allows for the run up the boom and a balance for reaching into various corners of the hold and up the dock for the ordinary purposes of the vessel (Ap. 47, 62)."

The evidence shows exactly to the contrary of the above contentions of the appellee. We quote the following from the testimony of Evanson, an expert called by appellee (Ap. 54):

> "The COURT. Q. What relation is there between the boom and the falls that it should be 3 to 1?
>
> A. They figure on a length of 3 to 1, that is, three times the length of the boom, the distance you go up and down, if the boom is 70 feet it will reach down in the hold, or wherever you have to reach.
>
> Q. That is so far as operating on the ship is concerned, if you have to reach away out on shore you need a longer fall?
>
> A. Yes."

That testimony shows clearly that the 3 to 1 rule was arbitrary as to length, and it also shows that the 3 to 1 rule is only applicable when the work is on the vessel. That if it is desired to do what had

to be done in this case, reach out on shore, the fall is too short and the rule is contrary to ordinary prudence.

The witness further testified (Ap. 51):

> "Q. With a 210 foot fall, has it been customary, or not, in taking lumber from up the dock, to disconnect the falls?
> A. Yes."

That shows that the following of such a rule showed lack of ordinary prudence, and the witness was then speaking of a 70 foot boom, the shorter the boom was the worse the vessel would be off.

The 3 to 1 rule, is thus shown, as in no way connected with what the vessel had to do in respect to the hauling of the cargo along the dock.

Further on on page 9 we find:

> "In view of this rule the shipowners provide in their charters that cargo shall be delivered within reach of ship's tackle. * * *"

There is no evidence on that point in the record.

On page 10 we find:

> "This was what was done with the "Daisy." Her booms, according to Mr. Freeman, were 56 ft. long, her falls 180 ft., cargo was to be delivered within 60 ft. of her side and within this distance she could take it easily without disconnecting the falls" (Ap. 56, 57).

Mr. Freeman never mentioned the ship's side. What he did say (Ap. 56):

> "All the cargo is supposed to be delivered within 60 feet of the vessel's tackle in sheltered ports, and those falls are plenty long enough for that."

We have already, in our brief, called the court's attention to the fact that what Mr. Freeman testified to was entirely without his knowledge. He may have known something about what the charter party called for as to where the lumber was to be delivered though, assuming that he did, his testimony is to the effect that the lumber was to be delivered 60 feet away from the extreme reach of the falls, not the vessel's side. The owner provided nothing to haul it that 60 feet, although they expected a load of lumber to be brought down on the vessel; they simply provided falls that were adequate inside of the ship's rails and nowhere else.

> Texas Pacific Railway Co. v. Callender, 183 U. S. 632, 638.
>
> "It was pointed out by the servants of the railway company and, within the custom of the port of New Orleans it had to be brought within the reach of the ship's tackle before the ship was called upon to take it. The expression, 'ship's tackle' means 'where the ship's ropes can get on to it so that the ship's winches can pull the cotton in.' "

Just how Mr. Freeman could testify that the falls were long enough to reach 60 feet beyond their extreme reach he did not state.

We were not required to show that the falls were shorter than customary, as stated on page 10 of appellee's brief. All we were required to show on that branch of the case was that they were of inadequate length, and all the testimony shows that, if appellee could absolve itself by proving a custom, it was for it to do it.

A great deal of pages 10 and 11 of appellee's brief are taken up with excerpts from the testimony of Frank on the supposed distance of the lumber from the edge of the wharf.

Frank's testimony was taken in a watchman's or freight clerk's office on a dock on a Sunday afternoon. The accommodations were limited; all, stenographer included, had to stand up, and counsel for appellant did the best he could. Before going into the distance of the lumber from the wharf the following occurred (Ap. 72) (italics ours):

> "Q. What, wouldn't they have a bolt or a *pile* to fasten that loose end to instead of having a man standing there holding it by hand?
>
> A. Well there are *piles;* those *piles* there are up to 199 and 200 feet apart from 50 to 200 feet apart. Sometimes you strike a *pile* when convenient, you do not have to travel half a mile, you simply slip a piece of rope over it, and hang the hook onto that pile, but if there is not somebody has to hang on to it.
>
> Q. There must be nothing to prevent driving a spike in or an iron rod or something to hold that loose end?
>
> A. If it is an iron rod or a spike that spike ought to be a heavy spike.
>
> Q. With a man holding it, if the drum happens to revolve it is either going to pull him over the wharf or he has to let go?
>
> A. He has to let go.
>
> Q. Have you ever known of those things being pulled out of a man's hands before?
>
> A. Oh it has happened many a time before."

This vessel was loading lumber from 12 to 30 feet in length. The witness was interrogated about lumber and *piles* all in one question and he evidently

undertook to give an answer on both the lumber and the *piles* he had already testified about. We have no apology to make, even after counsel's criticism, that the following answer is the only answer Frank gave that was positive, and the only one that means anything, to-wit:

> "Q. At any rate, you were only pulling the stuff, the lumber or piles, whatever it was you were moving, from thirty to fifty feet away from the edge of the wharf, and pulling them over the edge?
> A. Yes."

A previous question shows he had both lumber and piles in mind when he testified to a greater distance than 30 feet, to-wit:

> "Q. How far was the *pile* or the lumber that you were hauling over to the edge of the wharf, away from the edge of the wharf, about how far?
> A. About—well, I don't remember exactly. It all depends on the length of the lumber. If it was about 30 ft., 30 ft. in one of the piles, they ought to be at least 150 feet away from the ship."

Just what that means we do not know, and when he said in another answer "it might have been but from 75 up to 100 to 150 ft. away," the same answer contemplates that it might not have been more than one foot away. What it might have been, is not what it was.

Referring to paragraph (c) at the foot of page 12 of appellee's brief, we respectfully submit that all of the evidence in this case and common sense

dictates that the winch could not be safely operated when disconnected. Something is said about an eye-bolt being driven into the wharf. It was not shown whether the owners had ever furnished such eye-bolt, spike, or its equivalent. There is nothing to show a pile could have been reached, and all the evidence is that the rope fall was liable to be pulled on, and liable to be let go.

How does counsel know that with the turning of the shaft there "could not possibly be sufficient traction to operate against the weight of the fall" as claimed on page 14 of brief?

But appellee is precluded from raising any question as to the manner in which those on the vessel were operating the winches, as in paragraph III of the answer (Ap. 20) they plead as follows:

> "and the manner in which the vessel's winches were to be and were used in said operation which was usual and customary on lumber schooners."

That is supported by the evidence; but if there was negligence on the part of anyone on the vessel, that does not absolve the owner as it was the owner's first negligence that impelled the second negligence. The master of the vessel testified he could not get the lumber on board any other way, and in this respect the case of the Frank D. Stout does not apply as in that case the owners "supplied ropes." In this case they did not supply an adequate, proper rope.

Counsel is continually mentioning negligence on the part of the men on the "Daisy". They first plead and also prove that those men did things according to custom, then claim there was negligence. The claim that the owner is absolved is contrary to all the cases we cited and the following extract from

Globe S. S. Co. 245 Fed. 54,

cited on page 17 of our brief, in which case the learned Court of Appeals of the Sixth Circuit says, on page 60, as follows:

> "If the steam was turned on it is fully as likely that the oiler did it, and if the negligence of the ship owner in failing to keep the pump safe and seaworthy, contributed to the injury, the shipowner is liable notwithstanding the concurring negligence of the oiler."...

That is the law and completely answers all of appellee's contention on negligence of a fellow servant. No one, however, knows how this accident happened, except it is known that, if the fall had been long enough, it would not have happened.

As to assumption of risk, appellant was in the hold and knew nothing of what was going on on deck and no one can assume a risk that he knows nothing of.

On the question of how this drum turned, both drums must have turned opposite to the way the shaft turned up to the time the load was hooked onto. It is not, as counsel states, both falls must have been overhauled. As soon as they commenced to haul on the load the inshore drum would commence

to turn with the shaft, and there is nothing to show what caused the other offshore drum to turn if it did turn. However, the winchman was compelled to stand there with two hands and one foot engaged and a slight movement of his body might involuntarily throw the disengaged drum slightly in. What happened we do not know, except that it frequently happened that way, and the following on page 23 of said brief is absolutely unfounded, to-wit:

> "(c) That the idle drum, disengaged from friction, did in fact revolve at the time of the accident."

All the proof we have on that is as follows (Winchman Frank, Ap. 78):

> "Q. Well if the drum is not engaged in friction, do you say the fall will be hauled back by the revolving of the shaft of the other drum?
>
> A. It might be possible.
>
> (79) Q. Did it at that time?
>
> A. Well, search me, for it, by golly; I don't know. All of a sudden it happened. That is all I know.
>
> (80) Q. Do you know whether you did at that time, do you remember whether there was any pull on the offshore fall at the time you were hauling that load?
>
> A. No.
>
> Q. Is it possible that you might have given a slight pull on the offshore lever or not?
>
> A. Yes. Really I couldn't tell you how it happened. All I know all of a sudden it happened."

There is nothing in that testimony on which to base a claim that the drum revolved.

As to the rest of the claims on pages 12 and 13 of said brief, we respectfully submit that they are all, likewise, against the evidence.

Appellee again cannot complain of what was being done on the "Daisy" for another reason, and that is that in paragraph I of their special defense (Ap. 17 and 18) they approve of everything that was being done on the vessel, and claim it was being correctly done.

As to the claim that a spike should have been driven in, we respectfully call the court's attention to the fact that appellee sent the vessel out and claims she was operated in the customary manner. They cannot claim negligence in the following of a custom that they themselves compelled and claim protection under.

Particularly where they used the appliances furnished by the owner of the vessel, in this case, and there is nothing to show that it furnished any other, on the contrary the owner claims they were adequate, when all the proof shows they were not.

Dated, San Francisco,
March 6, 1922.

Respectfully submitted,

H. W. Hutton,
Proctor for Appellant.